

Waites, M. (2013) United Kingdom: confronting criminal histories and theorising decriminalisation as citizenship and governmentality. In: Lennox, C. and Waites, M. (eds.) Human Rights, Sexual Orientation and Gender Identity in the Commonwealth. Human Rights Consortium, Institute of Commonwealth Studies, London, UK, pp. 145-181. ISBN 9780957354883

Copyright © 2013 Institute of Commonwealth Studies.

A copy can be downloaded for personal non-commercial research or study, without prior permission or charge

The content must not be changed in any way or reproduced in any format or medium without the formal permission of the copyright holder(s)

When referring to this work, full bibliographic details must be given

<http://eprints.gla.ac.uk/87609/>

Deposited on: 26 February 2014

## **United Kingdom: confronting criminal histories and theorising decriminalisation as citizenship and governmentality**

*Matthew Waites*

The people of the United Kingdom must come to terms with a shameful history of lives ruined due to criminalisation of sex between men across the British Empire. Responsibility for this extended beyond government into domestic and colonising populations that collectively stigmatised and excluded same-sex relationships. The British of past generations have lacked a moral guilt for this colonial regulation, in stark contrast to the enormity of their historic sexual guilt – an ironic imbalance, possibly unique to a certain kind of Christian country. Yet the United Kingdom's leading role in criminalisation was subsequently inverted when it became the first Commonwealth state in which reform was instigated. The partial decriminalisation enacted in England and Wales in 1967, although extremely narrow in conception, was a landmark event that has offered hope internationally to many peoples – and can still offer insights for the present.

Perhaps the British can now make a more serviceable offering than hope or guilt – that being an intellectual legacy. The radical social analyses of decriminalisation produced since the 1970s by British social theorists, such as Jeffrey Weeks (1981; 1989), Stuart Hall (1980) and Leslie Moran (1996), assisted by engagement with the French theorist Michel Foucault (1978a; 1981), should be considered a critical resource of continuing relevance for analysing contemporary struggles internationally. Hence, these are a major focus of this chapter, reconsidered and engaged for post-colonial adaptation and deployment worldwide.

This chapter<sup>1</sup> thus introduces the history of criminalisation, and of the first decriminalisation in the Commonwealth, but another central purpose

1 Acknowledgement: sections 2–4 of the chapter are an edited reprint from sections of ch. 5, 'Homosexuality and the age of consent', in M. Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (Palgrave Macmillan, 2005), pp. 96–117, reproduced with permission of Palgrave Macmillan, which I gratefully acknowledge. Thanks also to Corinne Lennox and Daniel Monk for feedback on this chapter.

in relation to the volume is to contribute to theorising decriminalisation. The analysis is used to introduce a variety of concepts which can assist in conceptualising decriminalisation generally: 'moral regulation', 'social control', 'hegemony', 'medicalisation', 'sexual citizenship', 'governmentality' and 'power' itself, among others. It is hoped that this, together with a distinctive proposed theorisation of citizenship, will provide valuable conceptual resources to readers engaged in ongoing decriminalisation struggles worldwide.

The chapter first discusses the historical origins of the criminalisation of sex between men in the United Kingdom. Section 1 introduces the peculiarly punitive legal tradition that has shaped the regulation of sex between men in the UK, with attention to differences between England and Wales, Scotland and Northern Ireland. It facilitates understanding of the legal forms and social contexts of state prohibitions on anal intercourse, created from the 16th century, and of new forms of criminalisation of sex between men in the late 19th century. The absence of parallel sex offences regulating sex between women is also explained, although there is not space to examine wider forms of criminalisation of relationships between women, through family law regulating women as wives, mothers and daughters in relation to divorce and parenting (via reference to consummation of marriages, adultery, inheritance etc); or through other laws such as on censorship (see for example Oram and Turnbull 2001, pp. 158–71).

The main focus of section 2 is how the regulation of same-sex sexual behaviour was opened to review by government in the 1950s, and how this shaped a partial decriminalisation of sex between men in England and Wales in 1967 – also eventually achieved in Scotland (1981) and Northern Ireland (1982), and throughout the United Kingdom's territories, as well as in many other Commonwealth states. Also examined is the official committee that produced the influential Wolfenden report in 1957 (Committee on Homosexual Offences and Prostitution 1957), followed by a discussion of subsequent support from the new Homosexual Law Reform Society and politicians of the liberal left, crucial in achieving the 1967 reform. The subsequent extension of decriminalisation, via equalisation of age of consent laws in 2000, is also commented on to demonstrate how a 'rationale of containment' was reproduced (Waites 2005a).

Section 3 provides an examination of the conceptual frameworks underpinning decriminalisation. The focus is on the public/private dichotomy, the relevance of rights, a growth of moral individualism and the interplay of these with the understandings of male sexualities that informed the Wolfenden committee – including with respect to debates over the minimum age. In section 4, a review is presented of existing critical analyses by Jeffrey Weeks (1977; 1981), Stuart Hall (1980), David Evans (1993), Leslie J. Moran (1996) and others, which have deployed radical sociology's theories of deviancy and social constructionism, together with the varying conceptual frames of sexual

citizenship, feminism and queer theory. These have revealed both the restricted legal forms of decriminalisation and the discourses privileging heterosexuality through which it was achieved. Particular attention is given to varying usages of works by French social theorist Michel Foucault (1978a; 1981; Smart 2002). Following the main thrust of these analyses, it is argued that the Wolfenden report's assertion of a realm of individual privacy entailed complex governing processes seeking containment of homosexuality, including through moral and medical regulation.

In section 5, two ways of improving existing analyses of decriminalisation are proposed. First, by giving explicit analytical attention to two new forms of citizenship produced for homosexuals, by focusing on both private sexual acts and on political participation. Second, by engagement with Foucault's (1978b, 2007) later work on governmentality which, somewhat surprisingly, has not previously been applied in a sustained way in the literature on UK decriminalisation. In conclusion it is argued that these more elaborate conceptualisations of citizenship and governmentality, can simultaneously deepen and develop analyses of decriminalisation.

## **1. The historical origins of criminalisation in the United Kingdom**

The history of the criminalisation of sex between men in the United Kingdom has been the focus of extensive academic attention since the gay liberation movement emerged. Jeffrey Weeks was the first to write this history in a way that challenged the presumed inferiority of gay and lesbian lives, analysing the problematic relationships between legal terminology and social identities, using what he called a 'social constructionist' approach emphasising the socially formed meanings given to sexualities (Weeks 1977; 1981). The history can be briefly summarised in the light of such approaches.

The criminalisation of same-sex sexual behaviour between men in Britain has been described as reflecting a 'punitive tradition' of law (West and Wöelke 1997, p. 197), a consequence of what Weeks has referred to as a 'long tradition in the Christian West of hostility towards homosexuality' (Weeks 1989, p. 99). The first recorded mention of 'sodomy' in English law is found in the medieval treatise *Fleta*, surveying the law in 1290, which asserts that those 'taken in the act' of sodomy should be 'buried alive' (Moran 1996, p. 213; Human Rights Watch 2008, pp. 13–14). In Christian doctrine 'sodomy' has been understood as a sin associated with God's punishment of the people in the city of Sodom, as narrated in the Bible, and the punitive legal tradition developed largely from such Catholic Church teachings – although persecution practices had various cultural causes. Such persecution forms a historical backdrop to the later criminalisation across the British Empire.

The legal history of the United Kingdom must be approached with an appreciation of the distinct histories of England and Wales, using what is

known as English law, Scotland with its system of Scots law, and Northern Ireland with its Northern Ireland law, albeit similar to English law (Dempsey 1998, p. 155). As context, England has historically been dominant, largely ruling Ireland from the 12th century and annexing Wales under English law from the 16th century. The Kingdom of England, including Wales, and the Kingdom of Scotland were brought together as Great Britain in law through the Acts of Union in 1707. The United Kingdom of Great Britain and Ireland was subsequently created in 1801, a formality concealing a colonial relationship. After a war of independence, Ireland was divided in 1922 between the Irish Free State and Northern Ireland, with the latter forming part of the United Kingdom of Great Britain and Northern Ireland. In this light the internationally influential notion of an 'English law' tradition, invoked in many legal textbooks, can be problematic if used in ways that erase Scots law and Northern Ireland law. However, with respect to sex offences, Scots law and English law have had shared characteristics and became more similar in the late 20th century.

State regulation of same-sex sexual acts first emerged in the context of an English monarch challenging the Catholic Church, establishing a legal system to extend state governance. An Act of Tudor King Henry VIII in 1533, outlawing the 'abominable vice of buggery', transformed the Church's ecclesiastical law prohibitions into 'statute' (state) law. The offence of buggery in England, Wales and Ireland applied to all forms of anal penetration with woman, man or beast, and was subject to the death penalty until 1861 (Weeks 1977, pp. 11–22; Moran 1996, pp. 21–88). 'Attempted buggery' could also be tried as an offence, described by Weeks as a 'catch-all rather than a refined legal weapon' (Weeks 1989, p. 100). Similarly in Scotland, 'sodomy' was outlawed in common law, although this applied only to sex between men; the death penalty was abolished by the Criminal Procedure (Scotland) Act 1887 (Dempsey 1998, p. 156).

Harry Cocks (2003, pp. 15–49) has used statistical and qualitative forms of analysis to demonstrate the way 'attempted buggery' and 'indecent assault' were increasingly used from the beginning of the 19th century to encompass many forms of sexual activity between men, such as masturbation and oral sex. In Scotland the common law offence of 'shameless indecency' was also increasingly used (Dempsey 1998, p. 156; Davidson and Davis 2004). However same-sex behaviour between women was not encompassed by the laws on buggery or sodomy, and hence tended to escape regulation via criminal law, despite being subject to prohibitions by various social institutions (Edwards 1981; Oram and Turnbull 2001).

The way in which English laws prohibiting sex between men influenced the creation of criminal laws in the British colonies from the mid 19th century has been described and analysed in the groundbreaking Human Rights Watch

report *This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism* (Human Rights Watch 2008; this volume). The process began with the enactment of the Indian Penal Code in 1860, including its infamous Section 377 outlawing sodomy (Baudh, this volume). This was replicated in the Straits Settlement Law of 1871 covering what are now Singapore, Malaysia and Brunei (Human Rights Watch 2008, p. 21; Obendorf, this volume; Shah, this volume).

A key subsequent development in the United Kingdom was the passing of the infamous 'Labouchère amendment', proposed by Henry Labouchère MP to create the offence of 'gross indecency' in the Criminal Law Amendment Act 1885 – a year Weeks has described as an 'annus mirabilis' of sexual politics (Weeks 1989, pp. 87, 96–121). This Act applied throughout England, Wales, Scotland and Ireland. Section 11 of the Act stated:

11. Any male person who, in public or private, commits, or is party to the commission of, or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

This occurred in the context of social purity movements, led by middle class moralists and feminists campaigning against prostitution and for the defence of the family (Waites 2005, pp. 67–87). 'Gross indecency' became significant over time for broadening the perceived scope of the criminal law; while not specified precisely in terms of sexual acts, the terminology could be interpreted to encompass all sexual behaviour between men. The new offence was initially little noticed and did not mark a revolutionary turning point (Brady 2005), but it came into greater prominence and usage when used to prosecute the writer Oscar Wilde in 1895 (Waites 2005, p. 85). Further international extensions of criminalisation to colonised territories incorporated versions of 'gross indecency', for example in Sudan and Queensland, Australia, in 1899; and in African colonies between 1897 and 1902 (Human Rights Watch 2008, pp. 20–1).

Lesbianism became more defined by the new sexology of the early 20th century, and its growing visibility generated pressures for legal prohibitions. A parliamentary attempt to criminalise all sex between women in 1921 was only unsuccessful due to the desire of MPs to maintain the social invisibility of lesbianism (Doan 2001, pp. 31–63; Oram and Turnbull 2001, pp. 166–9). Yet there was a deliberate move to regulate same-sex sexual behaviour involving young women under the age of 16, via a gender neutral section on 'indecent assault' in the Criminal Law Amendment Act of 1922 (Waites 2005, pp. 88–96). This climate of state hostility to homosexuality continued until World War II. Only from the mid 1950s did the regulation of homosexuality return to the political agenda.

## 2. From the Wolfenden report to decriminalisation

A key development came on 24 August 1954 with the government's appointment of the Committee on Homosexual Offences and Prostitution as a joint committee of the Home Office and Scottish Home Department to examine the regulation of homosexuality and prostitution in England, Wales and Scotland. The chairman, Sir John Wolfenden, had an Oxford University background and was regarded as a safe pair of hands by Home Secretary David Maxwell-Fyfe; the committee and its report subsequently became known as the 'Wolfenden committee' and the 'Wolfenden report' (although there were later Wolfenden reports on unrelated topics: Wolfenden 1976; Weeks 2004). The review and the subsequent decriminalisation of male homosexuality have been the subject of extensive commentary,<sup>2</sup> including at the international conference 'Wolfenden50',<sup>3</sup> and therefore this chapter provides only a brief account before proceeding to analyse the committee's view of the role of legislation in defining non-heterosexual citizenship (Committee on Homosexual Offences and Prostitution 1957, cited hereafter as CHOP 1957).

It was, significantly, a Conservative government that appointed the committee to investigate what were perceived as two increasing social problems, in the context of rising prosecutions. The committee comprised various professionals, academics and religious ministers as well as MPs; its terms of reference asked members to consider 'the law and practice' relating to both 'homosexual offences and the treatment of persons convicted of such offences' and to offences connected to 'prostitution and solicitation for immoral purposes' (CHOP 1957, p. 7, para. 1). The association between homosexuality and prostitution reflected the committee's assumption that both were forms of deviance threatening the family as 'the basic unit of society' (p. 22).

The committee's report in 1957 included as its first recommendation 'That homosexual behaviour between consenting adults in private be no longer a criminal offence'; other recommendations sought the tightening of the law concerning public same-sex behaviour and street prostitution, although acts of selling sex would remain legal (CHOP 1957, pp. 115–17). The report offered

- 2 See: Weeks (1977), pp. 156–82; Weeks 1989, pp. 239–72; Weeks (2007b), pp. 47–55; Hall (1980); Bland et al. (1979), pp. 100–11; Mort (1980; 1999); Jeffery-Poulter (1991), pp. 1–89; Newburn (1992), pp. 49–70; Grey (1992; 1997); Evans (1993), pp. 53–4, 65–88; Higgins (1996); Moran (1995); Moran (1996), pp. 21–32, 91–117; David (1997), pp. 177–96; McGhee (2000; 2001); Davidson and Davis (2004); Houlbrook (2005); Cook (2007); Grimley (2009); Meek (2011).
- 3 An international conference, 'Wolfenden50: Sex/life/politics in the British World 1945–1969', organised by Graham Willett, Ian Henderson and others at Kings College London in June 2007, took the Wolfenden report's 50th anniversary as an opportunity to assess its impact worldwide (for papers see Weeks (2007a); Day (2008); Bennett (2010); Kinsman, this volume; Willett, this volume).

a crucial statement of reformist principles concerning the role of law in the United Kingdom, providing the conceptual basis for a wide range of subsequent legislation including the partial decriminalisation of male homosexuality in England and Wales via the *Sexual Offences Act* 1967,<sup>4</sup> and on issues including abortion, pornography and divorce. As Stuart Hall later argued, the Wolfenden report is a vital document in understanding state ‘reformism’ from the 1950s to the early 1970s: ‘It set out to articulate the field of moral ideology and practice which defines the dominant tendency in the “legislation of consent”’ (Hall 1980, p. 9).

The report subsequently informed further partial decriminalisation in Scotland via section 80 of the Criminal Justice (Scotland) Act 1980, which came into force from 1981, and in Northern Ireland via the Homosexual Offences (Northern Ireland) Order 1982 (Dempsey 1998; Davidson and Davis 2004; Jeffery-Poulter 1991, pp. 147–54; Reekie 1997a, pp. 180–1). Delay in Scotland can be attributed in considerable part to the oppositional stance of the Church of Scotland, in contrast to that of the Church of England, as well as to more conservative moral attitudes generally (Grimley 2009; Meek 2011); in Northern Ireland the wait reflected the influence of competing familial and religious nationalisms, both Unionist and Nationalist (Jeffery-Poulter 1991, pp. 147–54; Duggan 2012). Decriminalisation also followed later in other British territories,<sup>5</sup> and the report influenced debates over the legal regulation of homosexuality in many states including Australia, Canada, the United States, Ireland and New Zealand (Moran 1996, pp. 14–15; Kinsman, this volume; Willett, this volume).

Crucially, the Wolfenden report proposed only a *partial* decriminalisation of sex between adult men, to apply only in *private*, with a minimum age of 21 mirroring the age of majority – much higher than the age of 16 applying for a female engaging in vaginal sexual intercourse. Moreover, the report endorsed a range of medicalising and psychologising research and treatments for homosexuality which Moran (1996, p. 115) has termed ‘strategies of eradication’, illustrating that partial decriminalisation was conceived as a pragmatic means to manage a social problem medically and socially rather than legally. Homosexuality continued to be regarded as an undesirable condition, within what must be understood as a legal framework embodying ‘heteronormativity’, understood as ‘the institutions, structures of understanding and practical orientations that make heterosexuality seem not only coherent –

4 Some references to this and other reports include paragraph numbers, given in the form (CHOP 1957, p. 1, #1).

5 Bruce-Jones and Itaborahy (2011, p. 9) list Akrotiri and Dhekelia (2000), Anguilla (2001), Bailiwick of Guernsey (1983), Bermuda (1994), British Virgin Islands (2001), Cayman Islands (2001), Falkland Islands (1989), Gibraltar (1993), Isle of Man (1992), Jersey (1990), Montserrat (2001), Pitcairn, South Georgia, St Helena, Turks and Caicos Islands (2001) and ‘all other territories’.



that is organized as a sexuality – but also privileged’ (Berlant and Warner 1998, p. 548; McGhee 2000; 2001).

The Wolfenden committee was thus not created with a ‘permissive’ intent, but was a product of increasing social anxieties concerning the increasing incidence and public visibility of homosexuality and prostitution. As Stuart Hall has argued, the immediate circumstances surrounding the Wolfenden committee’s creation can legitimately be described as a ‘moral panic’ (Hall 1980, p. 8; cf. Cohen 1972), generated by a series of high-profile spy scandals and trials (Weeks 1977, pp. 156–67; Jeffery-Poulter 1991, pp. 8–27; Newburn 1992, pp. 49–51). Nevertheless, significant opinions were moving in favour of decriminalisation prior to the committee’s creation. An editorial from the *Sunday Times*, proposing a public enquiry, illustrates this:

Homosexuality is rich pasture for the blackmailer; for the social stigma and the legal penalty of disclosure are alike terrifying to the wretched invert who, perhaps by a single reckless deed, has given way in secret to his warped desires ... One may well ask whether, in regard to consenting acts between adult males, the truth is not that the real offence is to be found out ... Notorious inverts occupy eminent places ... In all this matter our society is riddled with hypocrisy. The law it would seem is not in accord with a large mass of public opinion ... The case for a reform of the law as to acts committed in private between adults is very strong. (*Sunday Times* 1954)

Hence, more tolerant attitudes played a role in the committee’s formation (Weeks 1977, p. 164; Weeks 1989, p. 241). The Church of England’s Moral Welfare Council published an interim report, *The Problem of Homosexuality*, in 1954, advocating a commission of investigation and decriminalisation, an important factor in achieving the review and eventual reform (Grimley 2009). Committee records suggest that most members expected decriminalisation to be recommended soon after sittings began (Higgins 1996, p. 63).

The review was not only the product of short-term controversy over homosexuality, but must be interpreted in the context of long-term social trends. The social upheavals of World War II contributed to higher levels of same-sex activity, as suggested by the first Kinsey report (Kinsey, Pomeroy and Martin 1948; Cook 2007, pp. 148–50). Partly in reaction to the war’s disruptions, the 1950s witnessed a strengthening of the ideology underpinning the nuclear family, with carefully segregated gender roles (Weeks 1977, pp. 157–9; Cook 2007, 167–71). This appears to have encouraged greater policing zeal. Indictable ‘homosexual’ offences known to police in England and Wales had increased from the 1930s, from 622 in 1931 and 2,000 in 1945, to 4,416 in 1950 and 6,357 in 1954 (CHOP 1957, Appendix I, table I). Recent histories have emphasised this was attributable to a variable ‘administrative and cultural basis’ of policing practices rather than a politically led ‘witch hunt’ (Houlbrook 2005, pp. 31–7 (esp. 32), 242), but increasing press coverage of homosexuality led to political concern.

The committee investigated theories of the 'causes' of homosexuality, examined its incidence, and sought to define the relationship between existing sexual offences and the concept of 'homosexual' in its terms of reference (CHOP 1957, pp. 11–20, 37–47; Moran 1995; 1996, pp. 21–32, 91–117). Among those who provided evidence were only three self-declared homosexuals, Peter Wildeblood, Patrick Trevor-Roper and Carl Winter. Wildeblood was a writer and vehement critic of the law who had been convicted of sex offences in a highly publicised trial involving Lord Montagu; Trevor-Roper and Winter, both respected as professionals, used evidence of blackmail and suicide to argue confidently in favour of decriminalisation (Higgins 1996, pp. 39–45).

When completed however, the Wolfenden report was very clear in refuting any intention to fully legitimise homosexuality, emphasising that the argument for decriminalisation was 'not to be taken as saying that society should condone or approve male homosexual behaviour' (CHOP 1957, p. 22):

It is important that the limited modification of the law which we propose should not be interpreted as an indication that the law can be indifferent to other forms of homosexual behaviour, or as a general licence to adult homosexuals to behave as they please. (CHOP 1957, p. 44, #124)

The approach was one of tolerance, and the limits of official tolerance were clear.

The committee's investigations concerning female homosexuality were extremely brief. The committee considered the sole offence relating to sexual acts between women, 'indecent assault' on a female, for which 'consent' had been removed as a defence for girls aged under 16 by section 1 of the Criminal Law Amendment Act 1922 (re-codified in the Sexual Offences Act 1956, s14.1). This was included in the committee's list of homosexual offences (CHOP 1957, pp. 36–8, #95–103; Moran 1996, pp. 97–8, 100). However, the committee were unable to find a single instance of an act with another female 'which exhibits the libidinous features that characterise sexual acts between males', concluding that all recorded convictions referred to the aiding and abetting of sexual assaults by males (CHOP 1957, p. 38, #103). Hence the existence of 'indecent assault' did little to destabilise the committee's assumption of women's lack of sexual agency and attentions appear not to have focused on lesbianism; 'homosexual offences' were in general assumed to be male (Moran 1996, pp. 97–101). No necessity was seen for reforming age of consent legislation for females. This approach was probably influenced by the rationale of the inter-war period that explicitly prohibitive legal regulation might be counter-productive in spreading knowledge.

The report's conclusions concerning male homosexuality received a 'mixed, but by no means entirely hostile reception', being endorsed by the Church Assembly, as well as *The Times* and the *Daily Mirror* (*Guardian* 1958). However, decriminalisation was dismissed as 'nonsense' by the *Daily Express*, and the *Daily*

*Mail* claimed decriminalisation would lead to an increase in perversion, though the *Daily Telegraph* remained more ambivalent (*Evening News* 1957). Hence, while the government enacted the report's recommendations concerning prostitution immediately through the *Street Offences Act* 1959, the proposals concerning homosexuality were shelved.

The Wolfenden report's publication was thus followed by a ten-year period of lobbying for decriminalisation. This was led by the Homosexual Law Reform Society, formed in 1958 as the first homosexual organisation in the United Kingdom to campaign for decriminalisation (Waite 2009). The definitive first-hand account is *Quest for Justice* by former Secretary Antony Grey, who died in 2010 yet deserves a place in history as a heroic initiator of collective struggle for decriminalisation (Grey 1992; 1997a). The Homosexual Law Reform Society lobbied MPs and organised public debates, utilising arguments according to the Wolfenden report, but with its public presence already destabilising the report's public/private boundary. Gay liberationists later criticised the Society for its timidity in claiming tolerance rather than equality, but relative to its context the organisation was radical. Grey's account illuminates the dedicated professional work by himself and others, including support for men charged with offences. He later recalled how the Society's respectable image concealed a subversive interior: 'I have vivid memories of several distinctly regal queens and pre-operative transsexuals who enthusiastically helped out in our Shaftesbury Avenue office (wearing full drag)' (Grey 1997b).

A series of attempts were made to implement the Wolfenden report in parliament, though reform proposals were strategically limited to England and Wales due to less sympathetic Scottish politics (Dempsey 1998, p. 157; Davidson and Davis 2004; Meek 2011). The Private Members Bill (non-government bill), which in amended form eventually became the Sexual Offences Act 1967, was first introduced into the House of Commons in June 1960 by Kenneth Robinson MP. Typically for such a bill it was to be debated via free votes without orchestration by party whips, but nevertheless it was defeated by a majority of more than two to one. After years of delay it was introduced again in May 1965, this time to the unelected House of Lords, by Lord Arran. During its passage, senior peers inserted a strict privacy clause, applying a more restrictive standard of privacy than for male/female behaviour. This specified that a 'homosexual act' would not be considered 'private' if 'more than two persons take part or are present', or if occurring in a public lavatory (Sexual Offences Act 1967, s1.2).

The bill passed through the Lords in July 1965 and was brought into the Commons by Conservative MP Humphrey Berkeley, known to be homosexual by many in parliament (Channel 4 1997a). After a general election and Labour victory in 1966, Berkeley lost his seat and was replaced as the bill's sponsor by Labour MP Leo Abse. With backing from the new Home Secretary Roy Jenkins, who from 1959 had criticised the 'brutal and unfair' law and endorsed

the Wolfenden report, parliamentary time was set aside by the government – despite the misgivings of Prime Minister Harold Wilson and many trade unions allied to Labour, and the vehement opposition of Foreign Secretary George Brown (Jenkins 1959; 1991, pp. 180, 209). The Sexual Offences Bill was eventually passed in the Commons by 99 votes to 14 on 3 July 1967, still on a free vote – but this was at 5.44 am after an all-night debate and use of elaborate parliamentary tactics by opponents. It finally passed through the Lords with votes of 111 to 48 at Second Reading, then without a vote at Third Reading, and the Sexual Offences Act received Royal Assent on 27th July (Grey 1992; Jeffery-Poulter 1991, pp. 28–89; Newburn 1992, pp. 55–62; Higgins 1996, pp. 123–48).<sup>6</sup>

John Campbell, a biographer of Roy Jenkins, has captured the flavour of the times:

Coinciding with Beatlemania, the miniskirt and ‘Swinging London’, but also with the Rolling Stones, the drug scene and the first Vietnam demonstrations, the period 1966–7 is now seen for good or ill as a turning point in the social history of the country – either a halcyon time of personal liberation or the onset of national decadence. (Campbell 1983)

This was a significantly different context from that in which the Wolfenden report had been published and the cultural politics certainly helped facilitate reform. Yet it was only with the emergence of the gay liberation movement from 1970 that the public vocabulary of campaigners shifted to demanding equality (Weeks 1977).

In government, the role of Roy Jenkins was crucial, both in securing parliamentary time and for his wider promotion of liberal reforms. Jenkins linked the issue to his broader political philosophy: ‘To enlarge the area of human choice, socially, politically and economically, not just for the few but for the whole community is very much what democratic socialism is about’ (quoted in Campbell 1983, p. 103). As a more recent Labour minister has commented on this ‘unashamedly liberal’ and ‘transformational’ Home Secretary:

It is an astonishing fact that Roy was Home Secretary for only one year and eleven months from 23rd December 1965 to 30th November 1967 ... [...] But it is not too much to say that in those 23 months he and his allies changed the face of society. The legalisation of abortion. The legalisation of homosexuality. ‘No fault’ divorce. The prohibition of racial discrimination. The abolition of stage censorship. The abolition of flogging in prisons. Radical reform of the police. Individually these reforms were important, some of them seismic. Taken together ... [...] they changed the face of society. (Adonis 2011, p. 8)

6 See also the records of the Homosexual Law Reform Society in the Hall-Carpenter Archive, Library of the London School of Economics and Political Science.

This commentary helps us to see decriminalisation in its wider social and political context, as achievable during what Jenkins called 'The Liberal Hour' – never matched when he returned as Home Secretary during 1974–6 (Jenkins 1991, pp. 199–213). Decriminalisation became possible in 1967 under a Labour government of the centre-left which leant towards social liberalism, and was related to allied or similarly framed struggles in the politics of gender, anti-discrimination, criminal justice and individual freedom. Rather than focusing our analytical attention excessively on an individual, this points to the importance of understanding decriminalisation struggles in the context of broader struggles over 'hegemony', the concept used by Marxist theorist Antonio Gramsci (1971) to describe a dominant cultural and political formation in a particular society. As Ernesto Laclau and Chantal Mouffe (1985) have suggested, hegemony can be detached from class reductionism and reconceptualised in the context of multi-dimensional forms of inequality and political resistance. But here we must focus analysis on the specific form of and factors influencing decriminalisation.

The terms of decriminalisation were very restricted. The new law stated:

Notwithstanding any statutory or common law provisions, but subject to the provisions of the next following section, a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of twenty-one years. (Sexual Offences Act 1967, s1.1)

A 'homosexual act', a concept introduced by the legislation, was defined as follows:

For the purposes of this section a man shall be treated as doing a homosexual act if, and only if, he commits buggery with another man or commits an act of gross indecency with another man or is party to the commission by a man of such an act. (Sexual Offences Act 1967, s1.7)

Hence the commissioning of homosexual acts, in addition to sexual activity itself, remained prohibited. Leslie J. Moran has provided the most elaborated discussion of how decriminalisation – apparently paradoxically – constituted the notion of homosexuality in law, through the Act's novel usage of the concept 'homosexual act' which conflated an identity with a set of acts (Moran 1996, pp. 91–117). Hence pre-existing offences of buggery and gross indecency were reinterpreted and reclassified as 'homosexual offences' with reference to the modern category of the homosexual from sexology.

Decriminalisation was informed by a growing degree of tolerance of homosexuality among political elites. That John Wolfenden's own son was openly homosexual, within his social circle and to his father, is indicative of establishment dilemmas (Faulks 1996, pp. 209–309). Evidence has emerged that homosexuals such as prospective Conservative Prime Minister Robert Boothby (later Lord Boothby) were peppered throughout parliament and

the establishment, and hence their political colleagues had every interest in decriminalising their activities. It has been credibly claimed that Boothby and Labour MP Tom Driberg, both known homosexuals, were protected from the press and police by cross-party agreement when their links to London gangland killers the Kray twins emerged in 1964. Boothby was involved in a friendship and possibly a sexual relationship with Ronnie Kray, while simultaneously the long-term lover of Lady Dorothy Macmillan, wife of Harold Macmillan – Conservative Prime Minister from 1957 to 1963 (Channel 4 1997b; *Independent on Sunday* 1997; *Pink Paper* 1997, p. 2). The Wolfenden report and decriminalisation should thus be interpreted as being influenced by political elites moving ahead of public opinion.

The political climate which eventually facilitated the passage of the Sexual Offences Act in 1967 was significantly less conservative than that which informed the Wolfenden report. By 1967, after such a long process of debate, 'the heat had largely been dissipated from the question' (Weeks 1977, p. 156; cf. pp. 168–82). Nevertheless, those arguing for decriminalisation employed many of the same arguments advanced by the Wolfenden report. They emphasised that homosexuality was the 'condition' of a particular group, possibly treatable but largely fixed. Leo Abse, the bill's sponsor, argued that homosexuality was a psychological problem requiring prevention and understanding; arguments he subsequently declared to have known were 'absolute crap' (Channel 4 1997a; McGhee 2000, pp. 84–5). Abse and others also emphasised the threat of blackmail under existing law, particularly to protect national security in the light of the Burgess and Maclean spy scandals. These were strategic claims, more assertive than the Wolfenden report, yet still largely within the same framework.

Decriminalisation had the effect of nullifying existing legislation that outlawed acts of buggery and gross indecency between men within a tightly delimited private sphere. However, this partial decriminalisation did not remove the offences of 'buggery' or 'gross indecency' from the statute and many consensual acts remained subject to prosecution. Decriminalisation applied only with no more than two men present, due to the House of Lords amendment imposing a specific, strict definition of privacy (Sexual Offences Act 1967, s2). The merchant navy and armed forces were exempted (Sexual Offences Act 1967, s5). Further regulations were imposed upon public behaviour, with soliciting (cruising or propositioning men) and procuring (inviting, encouraging and facilitating sex) remaining completely illegal, and the reformed law 'provided for the greater use of summary trial procedure as an alternative to jury trial', leading to a 150 per cent increase in prosecutions between 1967 and 1973 (Moran 1996, pp. 120–1). New strict sentences for buggery were also introduced for offences with people aged below 21 (Moran 1996). Additionally, a legal judgement in 1972 by the House of Lords subsequently decided that the 1967 Act exempted homosexuals over 21 from

criminal penalties without making their actions 'lawful in the full sense' (Weeks 1989, p. 275).

With respect to the age of consent, the Wolfenden committee advocated the age of 21 – the age of majority – as the most conservative age available, despite placing emphasis upon medical expertise:

Our medical witnesses were unanimously of the view that the main sexual pattern is laid down in the early years of life, and the majority of them held that it was usually fixed, in the main outline, by the age of sixteen. (CHOP 1957, p. 26, #68)

The report premised its recommendation of 21 upon a disjuncture between the formation of sexual feelings or desires for most individuals by 16, and attainment of the decision-making competence associated with mature judgements, as discussed elsewhere previously (Waites 2005a, pp. 114–17). The committee justified this with the argument that:

a boy is incapable at the age of sixteen of forming a mature judgement about actions of a kind which might have the effect of setting him apart from the rest of society. (CHOP 1957, p. 25, #71)

In this context, the committee chose not to employ the phrase 'age of consent' in its recommendations, preferring to describe the minimum age of 21 as an 'age of "adulthood"' (CHOP 1957, p. 115). This choice of language reflected their belief that a young man aged 16 did have the psychological competence to consent to sexual activity, but was not 'sufficiently adult to take decisions about his private conduct and to carry the responsibility for their consequences' (CHOP 1957, p. 26, #69). The Policy Advisory Committee on Sexual Offences, which subsequently reviewed the law in the late 1970s, also rejected 'age of consent' and used 'minimum age' in relation to the post-1967 legislative framework, on the grounds that it would be unrealistic to imply that the law assumed males under 21 were incapable of giving consent. Hence contestation of such terminology became an appropriate strategy for the Campaign for Homosexual Equality (Policy Advisory Committee 1981, p. 11; Waites 2005a, p. 147; pp. 145–55).

As a brief postscript, note that equalisation of the age of consent took place throughout the United Kingdom in 2000 and this should be regarded as an extension of the decriminalisation process. As elaborated elsewhere, this continued to occur within a 'rationale of containment', premised upon biomedical and psychological knowledge-claims asserting the fixity of sexual identities by the age of 16 (Waites 2005a, p. 181). This strongly suggests that contemporary decriminalisation campaigns internationally should not assume that, where a formally equal age of consent law is claimed, this will embody or imply a straightforward movement towards a wider social equality. Moreover, in India, the recent 'reading down' of Section 377 in the Indian Penal Code, through invocation of constitutional and human rights, illustrates



that for some understandable reasons decriminalisation campaigns do not always initially seek, let alone achieve, equal age of consent laws (Waites 2010). This suggests the cross-cultural value of analytical frameworks which problematise decriminalisation discourses for their approaches to youth and childhood. Analysis of conflicts in the United Kingdom suggests activists seeking decriminalisation in Commonwealth states should attend urgently to the social status of children and young people and the questions of whether, when and how to seek equal age of consent laws.

Having outlined and problematised the Wolfenden proposals and subsequent legal reforms, the next section reviews and develops critical analyses of decriminalisation. Analyses using social theory can assist the development of conceptual and political frameworks, and hence of arguments for both decriminalisation and legal equality, to ensure we challenge normative hierarchies and social inequalities rather than leave them intact.

### **3. Conceptualising decriminalisation: privacy, utilitarianism and the homosexual condition**

The critical aspect of the Wolfenden report's conceptual framework was its distinction between the *public*, regarded as being the legitimate realm of state intervention, and the *private* as a realm for individual moral decisions. The report stated that the function of the law:

is to preserve public order and decency, to protect the citizen from what is offensive and injurious, and to provide sufficient safeguards against exploitation and corruption of others. (CHOP 1957, p. 9, #13)

Hence:

It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined. (CHOP 1957, p. 10, #14)

The sphere of privacy was to be carefully delimited and tightly patrolled at the boundaries. The public/private dichotomy defined the crucial boundary around which the Wolfenden committee built its case for decriminalisation (CHOP 1957, p. 12, #12; p. 20, #49–52).

Despite this the Wolfenden report made no reference to the 'right' to 'privacy' asserted in Article 12 of the *Universal Declaration of Human Rights* (United Nations 1948), or the right to 'private and family life' in Article 8 of the *European Convention on Human Rights*; or indeed – as a careful reading shows – to human rights more generally. The *European Convention* was created in 1950 and in force from 1953, translating the Universal Declaration into law for states in the Council of Europe (2011). The United Kingdom had been a founding signatory – indeed British lawyers had played a central role in writing



it, conceiving this as a means to bring the civilising influence of British liberties into the continental context of post-war reconstruction.

The Wolfenden report presents a case for allowing a realm of individual privacy that, in the early pages, places considerable emphasis on the limits of appropriate state action and the limited 'function of the law', as quoted above. However, within the main body of the report when reaching conclusions, the committee struck a more affirmative note in relation to the moral status of the individual; one argument is cited as 'decisive':

the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. [...] to emphasise the personal and private nature of moral or immoral conduct is to emphasise the personal and private responsibility of the individual for his own actions. (CHOP 1957, p. 24, #61)

In light of this the report can be interpreted as articulating a new moral status for homosexuals. Notwithstanding the patronising emphasis on the 'personal responsibility' of individuals which the committee were stigmatising so extensively, the report gave a new affirmation of the moral entitlement to privacy of homosexuals, and this can be interpreted as the emergence of an implicit – although not explicit – understanding of a right to privacy.

That the issue of rights is avoided is remarkable, although not explicitly remarked in existing commentaries; yet, in context, it was unsurprising and typical of the extent to which issues of sexuality were not generally discussed in relation to human rights until the 1970s, much more so from the 1990s (Waites and Kollman 2009). The reference to 'citizens' already quoted demonstrates that an emergent minimal understanding of sexual citizenship was articulated in relation to homosexuals in the report (CHOP 1957, p. 10, #14; cf. Evans 1993), but the paucity of use of the term indicates that homosexual citizens' entitlements were hardly considered.

The Wolfenden report's advocacy of decriminalisation, and its distinction between public and private behaviour, were the product of a number of overlapping tendencies producing change in the principles structuring social life. They derived from a complex interplay of knowledge and beliefs: ethical perspectives, legal philosophies, medical knowledge and social attitudes towards homosexuality. A broad tendency away from ethical collectivism towards moral individualism among adults was one significant factor, drawing sustenance from social experiences of individualisation (Weeks 2007), a more prevalent tendency among middle-class men than other groups. The growing belief that society should respect the choices and feelings of individuals was linked to a growing sense of potential self-determination generated in capitalist societies, characterised by movements of people, rising levels of education, extension of the franchise and formal democratisation. A movement towards secularisation of state activity and increasing acceptance of religious diversity reinforced this shift, inducing doubt over the authority of traditional institutions.

A more specific but related shift in understandings of the role of the law occurred during the 1950s, from what can be described as 'legal moralism' to 'legal utilitarianism'. The Wolfenden report's distinction between public and private spheres was framed squarely in relation to debates between conservative paternalists and utilitarian liberals. It represented a revival of 19th-century liberal utilitarianism espoused by Jeremy Bentham and (especially) John Stuart Mill, asserting a clear distinction between the dictates of morality and the appropriate scope of law (Mill 1962; 1974). The principles at stake were most clearly articulated in the debate between High Court judge Lord Patrick Devlin and Oxford legal philosopher H.L.A. Hart that occurred in response to the report's publication (Devlin 1959; Hart 1963). Lord Devlin used his Maccabean lectures of 1959 to argue that the criminal law should embody key elements of a nation's morality, fostering these values; Hart responded by supporting the Wolfenden committee's distinction between sin and crime, and rejecting the law as an effective medium for transmission of social values.<sup>7</sup> Christie Davies has helpfully described the subsequent shift in the role of law slightly differently, as being from 'moralism' to 'causalism', towards a greater focus upon the practical effectiveness of prohibitive laws; Davies's work makes clear that the advocacy of decriminalisation depended upon a particular conjuncture of legal utilitarianism and ethical individualism with specific understandings of homosexuality (Davies 1975; 1980).

The Wolfenden committee's investigations occurred in the context of two simultaneous tendencies in the cultural definition and social positioning of 'the homosexual': increasing social visibility and increasing delineation. 'Homosexuality' became increasingly visible, due considerably to the agency of 'homosexuals', as the growth of urban subcultures developed and identities hardened, but also due to increasing investigations by modern institutions seeking to define and control the 'problem of homosexuality', including the media, the criminal justice system and medical science. Simultaneously, and through the same dynamics, there was a movement towards the increasing delineation of homosexuality from heterosexuality; proposals for decriminalisation were therefore intertwined with the production of new authoritative conceptions of scientifically defined homosexuals (Moran 1996). The Wolfenden inquiry was thus situated at the juncture of these two general tendencies which are embodied in its conception, its investigations and its conclusions. A limited progressive movement occurred within a wider framework of social forces in which mechanisms for homosexual containment were also embedded.

As argued previously (Waite 2005a, pp. 114–17), echoing the emphasis of Weeks (1981), the committee premised its conclusions largely upon the

7 The enduring influence of these positions in structuring debates over law in the UK was evident in the inclusion of a philosophical summary framed in these terms in Appendix C of the Law Commission's consultation paper (1995).

view that homosexuality was the unfortunate 'condition' of a distinct group of individuals, from which 'a total reorientation ... is very unlikely indeed' (CHOP 1957, p. 66). The fixity of sexualities above any legal age was thus the most fundamental element in the decriminalisation rationale. Despite being unconvinced by existing theories of homosexuality as a sickness, the committee tended to emphasise homosexuality as a distinctive 'condition', for example when it recommended the pursuit of further medical research into psychiatric and hormone 'treatments', leading to Home Office-funded electric-shock 'treatment' programmes being inflicted upon prisoners (CHOP 1957, p. 11, #18; p. 116, #xvi-xviii; *The Guardian* 1997). So it was largely by accepting expert claims that adult sexual identity was fixed as a 'condition' by the age of 16, that the committee proceeded. Dominant forms of sexology advanced arguments that, as Moran puts it: 'If homosexuality is fundamental to the sense of self and is innate, it cannot be regarded as punishable by rational persons who respect the laws of nature' (Moran 1996, p. 3). According to Higgins, evidence to the committee confirms that many of the strongest advocates of law reform were those who believed most strongly in homosexuality as a medical condition (Higgins 1996, p. 51).

However McGhee (2000; 2001) has presented a detailed examination of approaches to the age of consent and young people in the Wolfenden report and parliamentary debates leading to decriminalisation, which questions the extent of emphasis on the fixity of the homosexual condition. McGhee, developing themes from Moran (1996, p. 96), emphasises the influence of the Kinsey research which led to acknowledgement that 'homosexuality as a propensity is not an "all or none" condition', and that 'all gradations can exist' (CHOP 1957, p. 12; McGhee 2000, p. 69; cf. Mort 1999). Following on from this he highlights a 16–21 age period of 'unfixed and transitory sexualities' in which some young men were seen to be influenced into same-sex behaviour (McGhee 2000, p. 65). Relatedly, he emphasises that the committee also made unimplemented recommendations for rehabilitation programmes of 'treatment' of young men to contain the perceived threat of homosexuality spreading – through medical treatment via oestrogen, but also through social and moral guidance on appropriate behaviour. McGhee thus convincingly suggests that young men's heterosexuality was regarded as fragile and vulnerable to seduction. He underplays the extent to which 21 was used in 'expediency' by John Wolfenden – as the Chairman later publicly stated – to strategically legitimise decriminalisation as a response to public anxieties (Channel 4 1997a; Waites 2005a, p. 116). Yet McGhee's argument that the committee did perceive some mutable forms of same-sex behaviour in the 16–21 age period, and that this had some influence on the proposal for an age of 21, is convincing.

Nevertheless, the committee's proposals still remained structured around a heterosexuality/homosexuality dichotomy, which bisexuality or an identity/behaviour distinction were not permitted to fundamentally destabilise. The

rationale for decriminalisation thus implied managing the deviant desires of an inherently perverse group in society, who could never aspire to join the dominant moral community. Decriminalisation would not, according to its advocates, increase the quantity of homosexual activity. Despite some recognition of spectrums prompted by Kinsey (McGhee 2000), the medical and psychological conceptions of homosexual identity and behaviour, invoked by the Wolfenden committee, stressed the fixity of the homosexual 'condition' for most individuals by the age of 16 and thus involved a sharpening definition of what Sedgwick (1990) terms the homosexual/heterosexual binary (cf. Bech 1997).

The Wolfenden report's advocacy of partial decriminalisation of homosexuality within a narrowly defined private sphere must therefore be conceptualised as occurring at a complex conjuncture, the product of a variety of simultaneous shifts in culture and prevailing forms of expertise: a tendency towards the individualisation of moral decision-making; an associated though more specific shift towards utilitarian and causalist legal philosophies; a hardening of the homosexual/heterosexual distinction; an apparent failure to find ways to prevent homosexuality; and a limited growth in social tolerance. Only the coincidence of these tendencies facilitated the removal of legal regulation. This context must be understood in order to interpret people's experiences of ongoing power relations after decriminalisation in both the public and private spheres.

#### **4. Developing critical analyses of the Wolfenden report and decriminalisation**

Important and enduring analyses of the Wolfenden report and the Sexual Offences Act 1967 were produced in the 1970s by radical sociologists and historians including Jeffrey Weeks, Jock Young, Stuart Hall and Frank Mort, all associated with or influenced by the radical criminology of the National Deviancy Conference, formed in 1968. An analysis of the public and the private spheres can be developed through engagement with these existing critiques, which argued that the Wolfenden report represented an attempt to eradicate the problem of male homosexuality from public view via elements of 'social control', rather than pure 'permissiveness', 'liberalisation' or a straightforward step towards equality (Weeks 1977; 1989; Bland et al. 1979; Mort 1980; Greenwood and Young 1980; Hall 1980; Moran 1996). Jeffrey Weeks expressed this by arguing that Wolfenden was motivated by a desire for 'a more effective regulation of sexual deviance' (Weeks 1989, p. 242). Victoria Greenwood and Jock Young characterised the Wolfenden report as promoting a combination of 'normalisation' (in the sense of 'liberalisation' and formal equalisation within a restricted realm), 'medicalisation' and 'criminalisation' (Greenwood and Young 1980). Stuart Hall has described the report as representing 'a shift

in the disposition of moral regulation', emphasising: 'Wolfenden's "double taxonomy": towards stricter penalty and control, towards greater freedom and leniency, together the "two elements ... in a single strategy"' (Hall 1980, p. 14).

Consistent patterns were discerned by these theorists in the Wolfenden report's approach to prostitution, maintaining the legality of an individual act of selling sex while creating harsher penalties for soliciting and running brothels. Reforming approaches to other issues such as abortion and drugs were also noted to have been influenced by Wolfenden, favouring limited decriminalisation accompanied by medicalisation and restricted access mediated by professional authorities, rather than individual choice (Weeks 1989). Subsequently, Moran has analysed the report as both defining and regulating homosexuality (Moran 1995, pp. 21–2; 1996, pp. 102–17, esp. p. 115), and Evans has considered Wolfenden and 'permissiveness' in his materialist analysis of sexual citizenship (1993, pp. 65–88).

These critical theorists influenced by gay liberationism have drawn upon different strains of radical thought to interpret the Wolfenden report, including deviancy theory, Marxism and feminism, and the work of French post-structuralist Michel Foucault (1981)<sup>8</sup> – challenging assumptions that the rationale for decriminalisation was ever straightforwardly 'liberal' or 'progressive'. Such work has convincingly rejected the appropriation of the Wolfenden report and decriminalisation into liberal progressivist narratives of modernisation, civilisation, development and expanding citizenship, such as the influential citizenship theory of sociologist T.H. Marshall (1950; cf. Evans 1993). It has made the case for a critical reading of the Wolfenden report. Weeks, Mort, Hall, Greenwood and Young, and subsequently Evans and Moran, have advanced broadly similar accounts, emphasising a strengthening of 'public' regulation, while simultaneously drawing attention to new forms of medical and moral regulation applying in 'private' lives.

A further study of the Wolfenden committee by Patrick Higgins in the 1990s, entitled *Heterosexual Dictatorship* was also presented as a critique of liberal commentaries, claiming that: 'Commentary on the report has tended to be favourable to its contents, accepting a liberal spin, and has tended to elevate the importance of Wolfenden ... By the time of his death in 1985, Wolfenden had been elevated to the status of a liberal saint, the emancipator of the British homosexual' (Higgins 1996, p. 12). Higgins's work is important for its detailed examination of the Wolfenden committee's records, archived in the Public Record Office in London. Yet his analysis is flawed: he provides no references to his 'liberal' targets, other than Sir John Wolfenden himself; nor does he engage with any of the existing critiques of liberal readings. Consequently Higgins tends to reproduce the liberal mythology he is ostensibly against and actually

8 For accessible introductions to Foucault and his work on sexuality see Smart (2002), Weeks (1989, pp. 1–18) and Evans (1993, pp. 10–35).

gives a more liberal interpretation than the existing critical commentaries. Therefore it is the critical works employing social theory that can help provide us with the analytical framework needed to conceptualise decriminalisation. The differences between these works merit further sustained attention.

Let us consider in more detail how existing critical accounts of decriminalisation in the United Kingdom have theorised the process and its consequences. Jeffrey Weeks's accounts of decriminalisation have emphasised the increasing vigilance of the law in relation to the extensive scope of regulation applying to 'public' acts beyond the 'private' sphere: 'the logic of their position was that penalties for public displays of sexuality should be strengthened' (Weeks 1977, p. 165; cf. Weeks 1989, p. 243). In relation to 'private' behaviour, Weeks deploys the concept 'moral regulation', described as becoming the 'dominant form' of regulation in the 1960s (Weeks 1989, pp. 13–14, 243–4); this certainly remains a useful concept for describing how decriminalisation may involve new moral discourses about private behaviour from politicians and various institutions such as schools and health services. Weeks commented that 'the key point is that privatisation did not necessarily involve a diminution of control', but that the report accepted the psychologisation of homosexuality, while endorsing a continued search for 'treatments' and 'cures': 'In part at least the Committee was proposing no more than a shift of emphasis away from the law towards the social services as foci for social regulation' (Weeks 1989, p. 244).

Greenwood and Young similarly emphasised the committee's hope that decriminalisation in private might discourage public proselytisation in favour of homosexuality and sexual activities with minors. They note that Wolfenden advocated the more effective criminalisation of public homosexuality. This was coupled with medicalisation of prisoners to quiesce – rather than cure – their desires (Greenwood and Young 1980, pp. 164–6).

A somewhat greater emphasis is placed upon the continuing effects of regulation in the 'private' sphere in the work of Stuart Hall (1980) – in a volume which placed the concept of 'control' at centre-stage – and especially in that of Mort (1980; see also Bland et al. 1979, pp. 100–111). These are more closely framed in relation to 1970s Marxist approaches, including that of Althusser, which would seek to analyse the report as a straightforward expression of ideology working in the maintenance of capitalism, but they also strain to escape the strictures of such approaches. For Mort, Bland and McCabe in particular there is also a framing in relation to feminist theorisations of patriarchal power. These theorists invoke the work of Foucault as a means to theorise the continuing regulation of homosexuals in the private sphere (Bland et al. 1979, pp. 109–11; Mort 1980, pp. 41–4; Hall 1980, pp. 11–14).

Hall, like Weeks, notes the strengthening of public regulation, but places more emphasis on the limits of 'private' freedoms: in place of prohibition came not equal respect, but the 'welfare-statisation' and medicalisation of deviant

groups, who continued to be seen as 'social problems' needing 'treatment' (Hall 1980, pp. 9–11). To attempt to conceptualise this, Hall utilises Foucault's *Discipline and Punish*; he refers briefly to Foucault's concept of a 'micro-physics of power' involving governance via meticulous techniques to achieve 'a certain mode of detailed investment in the body' (Foucault 1978a). Hall thus argues the private arena remained a sphere of 'moral regulation', especially through 'self-regulation':

There was an underlying philosophy within Wolfenden ... [...] This involved a new principle for articulating the field of moral ideology. Wolfenden identified and separated more sharply two areas of legal and moral practice – those of sin and crime, of immorality and illegality. In creating a firmer opposition between these two domains, Wolfenden clearly staked out a new relation between the two modes of moral regulation – the modalities of legal compulsion and of self-regulation. This set of distinctions constituted a new, if temporary 'moral economy'. It marked a shift, however small and imperceptible at first, in what Foucault (1978[a]) has called the 'micro-physics of power'. This is the power of disposition, in this instance over sexual conduct. Such a power of disposition, Foucault argues, is 'not ... a property but a strategy', not a set of fixed attributions but 'a network of relations, constantly in tension, in activity'. It is a power 'exercised rather than possessed – not the privilege acquired or preserved of the dominant class, but the overall effect of its strategic positions' (Foucault 1978[a], p. 26). Wolfenden signified such a shift in the disposition of moral regulation. (Hall 1980, pp. 11–12)

This helpfully suggested how the moral discourses, through which decriminalisation was enacted, not only acted as external moral constraints upon individuals, but shaped their character and everyday 'dispositions' in a manner achieving 'self-regulation'. Frank Mort also invokes Foucault's 'microphysics of power' in seeking to explore forms of power in the private sphere: 'a variety of non-legal practices ... medicine, "therapy", psychology, and forms of applied sociology are all envisaged as forming new principles of regulation' (Mort 1980, pp. 43–4; see also Bland et al. 1979, pp. 109–11). However, following criticism, Foucault later rightly moved away from his disciplinary conception of the microphysics of power in order to allow a greater degree of agency in how we are formed as subjects (Foucault 1982, p. 208). In the commentaries by Hall and Mort 'self-regulation' was asserted in too encompassing a manner. Hall's account nevertheless revealed moral reformism as a 'signifying strategy', which 'declared and represented what its practice was aimed at accomplishing' by 'giving a message' advocating self-restraint by homosexuals after decriminalisation (Hall 1980, p. 20).

Hall's contribution appeared in a volume emphasising 'control', but this was questioned by critics, and subsequently we can see a helpful shift of emphasis in critical accounts from the concept of social control to the concept



of power. 'Control' problematically tends to imply the completeness, and also the external, constraining character, of a process (Miller and Rose 1988, p. 171). By contrast 'power' has increasingly emerged as a more useful concept to theorise inequalities beyond direct legal regulation. Leading theorist Lukes focuses on the importance of power operating to influence the actions of individuals without complete constraint, and often without their awareness (Lukes 2005); indeed Foucault takes this further in his late work with the view that 'there is no relationship of power without the means of escape or possible flight' (Foucault 1982, p. 225).

Subsequent work by Moran (1995; 1996) can be interpreted, in part, as proceeding with investigation of possibilities for a Foucauldian exploration of new forms of public and private regulation, including 'self-regulation'. Moran gives the most empirically rich critical account, drawing on archived Wolfenden committee minutes. He explores the new legal category of 'the homosexual' as, in Foucault's terms, a set of 'technologies', 'a whole machinery for speechifying, analysing and investigating' (Foucault 1981, p. 32; cited in Moran 1996, p. 16). He stresses that the installation of the term 'homosexual' in law itself implied the installation of a new set of regulatory technologies of medical and psychological examination, various forms of treatment and policing (Moran 1995, p. 21). Moran convincingly argues that the committee's report was important in producing certain cultural conceptions of homosexuality, particularly through conjoining 'buggery' and 'homosexual offences', entailing regulative effects spanning public and private realms (Moran 1996, pp. 21–32).

Moran identifies two 'strategies of eradication' through which the committee addressed homosexuality (Moran 1995, pp. 21–2; 1996, pp. 102–17, esp. p. 115). Firstly, 'juridical eradication' – the hope that homosexual acts might disappear into a decriminalised 'space beyond the law'. Secondly, the hope that homosexuals would seek treatment for their condition, leading to heterosexuality or abstinence, in a context where the committee also proposed more research to enable possible future eradication (Moran 1995, pp. 21–2; 1996, pp. 102–17, esp. p. 115). However his approach is a little one-sided – rather like Foucault's approach to modernity – in that it does not simultaneously explore emergent conceptions of individual citizenship, evident in the language of the report as quoted earlier; this does not quite capture the 'Janus-faced' character of the report (Waites 2005, p. 111). Emphasis on Foucault's term 'strategies', as for Foucault himself (1982, pp. 224–6), tends to have the effect of somewhat exaggerating the implied coherence of negative regulative intentionality.

David Evans's work is of some assistance here, as the origin of the concept of sexual citizenship that has subsequently become widely used and sparked global debates (Evans 1993; Bell and Binnie 2000). His theoretical framework is an enduring reference point, remaining the most sustained attempt to develop a materialist approach to sexualities; he argues that in capitalist contexts sexually



defined groups are differentiated and hierarchically positioned, engaging in forms of consumption in sexually defined spaces (Evans 1993). Evans's analysis suggests that certain kinds of citizenship may be granted to sexually defined groups in a manner which has the effect of them remaining in boundaried consumption spaces such as gay scene venues, while defusing demands for more extensive citizenship rights. He comments that decriminalisation in 1967 was associated with 'strengthened policing of public moral space'; yet for the male homosexual, 'legal status enfranchised his consumer status, to purchase, to market and exploit, the homosexual commodity. Necessarily the gay male did so in individualised virilised style' (Evans 1993, pp. 65–88, esp. p. 70). Evans thus helps understanding of how decriminalisation in a capitalist context may be achieved through discourses invoking experiences of freedom which, rather than yielding freedom as an unproblematic category, produce or foster certain understandings of freedom, and hence associated experiences and practices including those associated with individualised masculine sexuality and consumption. Yet his argument that such restricted forms of citizenship would frustrate claims for other forms has proved excessively pessimistic in recent years, as formally equal citizenship rights of most kinds except marriage have been achieved in the United Kingdom, as in the Equality Act 2010. There is an unconvincing dovetailing in Evans's model between sex/gender structures and economic structures. Nevertheless in the context of this book, Evans's work usefully encourages consideration of how some corporations may now have a financial interest in supporting decriminalisation in Commonwealth states in order to create commodified social spaces which only certain wealthy neo-liberal gay and lesbian consumers and tourists will be able to occupy. For example, in Belize the gay tourist website 'gaytravelbelize.com' encourages gay tourists to come to this state, where sex between men remains criminal, advertising property and services in a manner re-shaping social relations (see discussion of Belize in the opening chapter by Lennox and Waites).

The various critical analyses discussed have convincingly challenged liberal interpretations of Wolfenden by demonstrating new public regulation and persistent power in the private sphere. However, these analyses can be improved, as will be shown in the final main section.

## **5. Theorising decriminalisation as citizenship and governmentality**

The existing analyses of the Wolfenden report and decriminalisation can be developed, and critiqued in two respects. First, through more sustained attention to how the process involved the generation of new forms of political and social citizenship; and second, through engagement with Foucault's specific theorisation of 'governmentality', which – perhaps surprisingly – has not been attempted in existing UK discussions (Foucault 1978b; 2007). These two elements can be considered in turn, then brought together.

First citizenship needs to be reconsidered. Existing radical critiques of Wolfenden, it can be argued, do not attribute sufficient significance to aspects of the new conceptions of citizenship informing the report. Clearly, in relation to T.H. Marshall's well-known schema of civil, political and social dimensions of citizenship, the Wolfenden report offered no explicit articulation of homosexuals as deserving of most civil or political forms, and certainly made no case for social citizenship such as welfare rights (cf. Marshall 1950). However, while the Wolfenden report sought ways to eliminate homosexuality, if feasible, it simultaneously proposed granting some minimal citizenship rights. These took the form of two implicit emergent understandings of rights: an implied right to engage in consensual sexual behaviour within the private sphere, already suggested; and an implied right to a limited form of political citizenship. Though each was granted in forms unequal to those available to heterosexuals, each also opened possibilities for advancement.

The report discusses how far the law 'properly applies to the sexual behaviour of the individual citizen', implicitly including homosexuals, and argues for entitlement to privacy (CHOP 1957, p. 20, #52). Hence homosexuals were addressed in the language of 'individual freedom of choice' within a liberal framework of universal citizenship (CHOP 1957, p. 24, #61). While such language is clearly fundamentally at odds with the equally apparent desire to eradicate homosexuality through medical treatment, it is important to acknowledge this Janus-faced, contradictory and ambivalent character of the report, rather than representing the impulse to eradicate as predominant or more fundamental, as Moran (1996) has tended to. The Wolfenden report's tentative invocation of a citizen's privacy drew implicitly upon forms of liberal political philosophy in which liberty and rights represented fundamental and universal aspects of citizenship.

Turning now to the second implied right, a form of political citizenship, it can also be argued that Wolfenden's public sphere was not exclusively characterised by regulation in the way that radical critiques have tended to imply. The decision to decriminalise private sexual behaviour was also associated with some significant informal recognition of other aspects of the civil and political citizenship of homosexuals, relating to the public sphere. The Wolfenden committee's review involved homosexuals speaking for themselves in a process of consultation, in which they were treated with basic respect. These consultations represented very limited engagements, since the committee meetings were held away from public view and only three homosexuals gave evidence in person. Nevertheless the polite exchanges which occurred, in which Wolfenden referred to homosexuals as a 'community', embodied a minimal level of recognition that homosexuals collectively deserved representation and a political voice (Higgins 1996, p. 44, pp. 39–45). The subsequent formation of the Homosexual Law Reform Society (HLRS) illustrates that the report contributed to a shift in the political climate, facilitating greater recognition

of homosexual civil and political rights including free speech and freedom of association (Grey 1992). The Wolfenden committee's review and report tended to suggest an acceptance that homosexuals could participate in certain minimal ways in the public sphere, as political citizens; and the decriminalisation debate involving HLRS embodied this.

Expanded understandings of politics have been endorsed by feminist theorists such as Millett (1971); many have emphasised ways in which 'the personal is political', influencing views of the political aspects of citizenship as existing beyond traditional political institutions, throughout much of social life (Bell and Binnie 2000). Such a perspective implies the need to recognise that the two implied proposals identified here, for a right to privacy and a right to a minimal form of political citizenship, held implications not only for sexual behaviour, but also for homosexual lives, relationships and aspects of citizenship more broadly.

However, to contextualise the two emerging forms of citizenship identified and further theorise decriminalisation, it is necessary to extend discussion of Foucault. Missing from all the critical analyses surveyed is reference to Foucault's works on governmentality – much of it only translated or published since 1991 (Burchell et al. 1991). Governmentality is a concept introduced by Foucault, in his 1977–8 lecture series 'Security, Territory, Population', to address deficiencies in his earlier work, as a synonym for 'governmental rationality' implying a systematic form of thought (Foucault 1978b; 2007; Gordon 1991; Dean 1999, pp. 10–11). Foucault defined government in social life as 'the conduct of conduct', 'a form of activity aiming to shape, guide or affect the conduct of some person or persons' – whether (for example) of the self, or through political sovereignty; but much of his focus was on the state (Gordon 1991, p. 2; cf. Foucault 1982, pp. 220–1).

Foucault focused on 'the era of a "governmentality" first discovered in the 18th century', associated with the rise of the modern state, described as exemplifying 'the art of government' (Foucault 1991, pp. 102–4). His governmentality theorising is associated from the start with analysing 'normalisation' (Foucault 2007, p. 55); for Foucault, this takes a specific form from the 18th century, which shifts from the 'sovereign-subject relationship', promoting direct adherence of individuals to a norm, to the new 'relationship between government and population' (p. 71). This occurs in the context of emerging 'statistics' yielding probabilities and 'curves of normality', measuring relations between individual cases and populations: 'establishing an interplay between [...] different distributions of normality and [...] acting to bring the most unfavourable in line with the more favourable' (Foucault 2007, pp. 62–3). Rather than law imposing direct constraint, power operates through 'employing tactics rather than laws, or [...] employing law as tactics' (Foucault 2007, p. 99).

Foucault used governmentality to think about the emergence of liberalism, and the need to problematise how its freedoms were associated with 'technologies

of power', conceptual frameworks configured with social practices.

This freedom, both ideology and technique of government, should in fact be understood within the mutations and transformations of technologies of power. (Foucault 2007, p. 48)

Such 'technologies of power' would include, for example, the discourse of the homosexual 'citizen' emerging in the decriminalisation process, psychologised and associated with a new moral responsabilisation.

Governmentality theory has emerged as a major approach in contemporary social theory (Dean 1999); it identifies and challenges ways in which invocations of individual freedom and choice have often been associated with 'responsibilisation'. Power is conceived as achieving self-regulation, and there is a central view that 'the human subject as individuated, choosing, with capacities for self-reflection and striving for autonomy, is a result of practices of subjectification' (Miller and Rose 2008, p. 8). Governmentality, however, helpfully moves on beyond the excessive emphasis on the direct efficacy of disciplinary power in Foucault's works of the mid 1970s, and some who this influenced (Hall 1980). His governmentality theory moves towards a more realistic and consistent view; although Foucault's emphasis on the pervasiveness, scale and extent of power remains somewhat unconvincing.

A focus on the history of what Foucault (1981) calls 'biopower' ('power over life') helps us to situate Wolfenden and decriminalisation in the *longue durée*, and by doing so we see the scale of the rise of the governmentality associated with the modern state as it related to sexuality, from the 18th to the late 20th century. Foucault's account of biopower emphasises the important legacy of confessional processes associated with Christian pastoral power, influencing modern forms of medicine and therapy which proceed through similar confessional processes – of which the institutional expansion in the state, private and voluntary sectors provided a vital context for decriminalisation. This gives us perspective on the scale of structured power hierarchies and the specific professional practices shaping governance of homosexuals that were instituted in the so-called 'private' sphere. To a significant extent, the state could withdraw direct juridical constraints from 'private' life because population becomes 'penetrable' (Foucault 2007, p. 72). Governmentality is a useful approach in conceptualising how authorities seek governance of homosexuals even as criminalisation is withdrawn.

In the United Kingdom's decriminalisation, the 'homosexual' became installed in law as a categorised form of individual, while the law also maintained the stigmatised category 'buggery', articulated with the 'homosexual' through the concept 'homosexual offence' (Moran 1996).<sup>9</sup> Simultaneously the

9 Articulation is defined by Laclau and Mouffe to mean 'any practice establishing a relation among elements such that their identity is modified as a result' (Laclau and Mouffe 1985, p. 105; cf. Waites 2010, p. 973).

homosexual was defined by Wolfenden's experts as both psychologically and morally problematic, needing therapy and guidance on values. Miller and Rose helpfully question the authority of the 'psy disciplines', emphasising that supposedly problematic groups are constituted through discourses which make them amenable to social interventions (Miller and Rose 2008, pp. 7, 15). In this light the Wolfenden report's address of homosexuals using the concept 'citizen' in a highly selective way, placing high emphasis on citizen responsibilities to manage conduct without reference to most civil, political and social citizenship rights, can itself be interpreted as part of a moral discourse constituting responsibilised homosexual citizens. Governmentality works through citizenship.

Social invisibility via privacy or eradication was defined as the norm for homosexuals, ameliorated only by a minimal form of political citizenship; and a variety of moral and medical discourses were developed to pursue 'normalisation' in this respect – alongside the dramatic increase in prosecutions that followed decriminalisation (Moran 1996, p. 132). The age of adulthood and the approach to brothels are examples of the use of law as 'tactics'; the proposal on prisoner hormone treatment is an example of tactics in place of law, seeking to reduce desires and hence sexual behaviours when prisoners were released (Foucault 2007, p. 99).

Central to Foucault's purpose in introducing governmentality was to emphasise practices of governance of entire populations, such that statistical patterns and normalities discerned demographically became the concern, rather than the direct management of every individual case. This is particularly clear in Foucault's lecture of 25 January 1978; he discerns a shift from 'disciplinary' 'normation', associated with 'the primary and fundamental character of the norm' – whereby individuals are categorised as normal or abnormal according to whether or not they adhere to the norm – to a more complex form of 'normalization' associated with a 'calculus of probabilities' (Foucault 2007, pp. 57, 59; pp. 55–86). Foucault's approach here suggests that, rather than being oriented to the universal absolute adherence to norms, the later form of governmentality seeks a wide degree of accordance. This can be used to interpret the Wolfenden report's concluding recommendations which advocated decriminalisation in private with a high 'age of adulthood' of 21, also arguing that the law should explicitly outlaw homosexual brothels and homosexual prisoners should be permitted hormone treatment. In the light of governmentality theory, these recommendations can be interpreted as attempting to lower the statistical incidence of homosexual offences and related criminal proceedings, to quell the rise shown in the report's tables in order to diminish the visibility of homosexuality in the public realm – without an expectation of universal adherence.

Differently from existing approaches, including that of Moran, here Foucault's governmentality analysis suggests that we should not conceive the

operation of power as seeking absolute 'eradication' in practice (cf. Moran 1996, p. 115); rather, it implies dominant forces oriented to a sufficient degree of eradication of homosexuality – mainly from *public* life – to maintain desired social norms in the population. Governmental discourses are formed through assumptions that some individual cases will not comply. Careful consideration of what Foucault says about governmentality in detail thus, perhaps unexpectedly, draws attention to the *limited* extent to which authorities are oriented towards achieving complete compliance. Moreover 'the approach ... does not attribute a unity, individuality or rigorous functionality to the state' (Smart 2002, p. 128). An analysis emphasising the direct influence of discourses on individuals is unsatisfactory; the analytical stance proposed here instead emphasises that more diffuse and multiple discursive practices operate to achieve only a sufficient degree of normalisation. Hence, while Weeks (2007b, p. 133) in his most recent work tends to reject governmentality theory for implying too much of a pessimistic top-down view of power, it is important to assert that in a moderated form it can still be one element of our analytical framework, although must be counterbalanced by some acknowledgement, the growing individual choices, rights and liberties irreducible to governmentality that Weeks emphasises. This interpretation moves us towards a better overall analysis.

## 7. Conclusion

This chapter has sought to put the United Kingdom at the service of the Commonwealth, by presenting a history of criminalisation and decriminalisation in a manner that illuminates analytical concepts and theories that may be useful in conceptualising contemporary decriminalisation struggles worldwide. The chapter began by surveying the history of criminalisation in the United Kingdom, tracing the cultural and religious origins of a punitive legal tradition. It then explored the formation of the Wolfenden committee in 1954 and its internationally influential report recommending partial decriminalisation in 1957. Factors influencing decriminalisation were then examined, suggesting the importance of analysis with a consciousness of what Gramsci, and Laclau and Mouffe, term 'hegemony'. The chapter then proceeded to review and discuss existing analyses of decriminalisation, drawing attention to the value of a variety of concepts and theories for interpreting that process: privacy, moral regulation, medicalisation, social control, power, strategies of eradication and sexual citizenship. All of these have some value and a part to play in an overall analysis, although to varying degrees as suggested by the discussion.

In the chapter's final section it has been argued that analysis of decriminalisation can be refined by developing a better understanding of citizenship, and specifically of the very narrow forms of private and political citizenship granted to 'homosexuals' by the decriminalisation process. Alongside

this, Foucault's (2007) understanding of governmentality was argued to have some value for interpreting the decriminalisation process. Governmentality theory suggests that the homosexual 'citizen' emerging in the Wolfenden report needs to be seen in association with discursive tactics inciting sexual abstinence, medicalisation, privatisation and political restraint, all operating as part of population management described by Foucault as bio-power. Yet there was nevertheless positive potential in this concept of citizenship and the associated, implicit notions of a right to privacy, and a right to a minimal form of political participation.

So how should the relationship between citizenship and governmentality be expressed when combined in an overall analysis? As argued previously, Wolfenden and decriminalisation need to be seen in part as reflecting long term tendencies towards the emerging influence of liberal political philosophies among governing groups and 'the individualisation of moral decision-making among adults', associated with social experiences of individualisation (Waites 2005a, p. 105; cf. Weeks 2007). The use and significance of the emerging concept of citizenship should not be ignored, or emerging implicit understandings of rights: 'it is important to recognise this Janus-faced, contradictory and ambivalent character of the report' (Waites 2005, p. 111).

As has been argued, the new forms of citizenship and implicit rights have to be seen in the context of governmentality, the various discursive and regulatory tactics used to incite self-restraint and self-governance in the new private realm. But Foucault's conception of governmentality did tend to imply an unconvincing level of coherence emerging from amorphous authorities, with concepts like 'tactics' tending to personify government in a manner which implied excessive intentionality, direction and efficacy. We should interpret and utilise governmentality in a more flexible way, assuming more mediated effects.

To draw the analysis together, it has been argued that the Wolfenden report and decriminalisation *simultaneously* embodied *both* citizenship *and* governmentality. These can be understood as to an extent working through one another, yet with neither reducible to the other. The Wolfenden report can then be seen as socially achievable in 1957 only in the context of expanding state mechanisms and technologies of governmentality. However, by 1967 the increasing support for liberal understandings of citizenship made a limited partial decriminalisation in the private realm viable without being premised on expectations of successful self-medication, abstinence or abjuration of public politics by homosexuals.

What then can the history of the United Kingdom's decriminalisation reveal for the rest of the Commonwealth? This question is partly addressed in the comparative chapter that concludes the present book. Prescriptive lessons are not appropriate and readers in different societies can decide what they are able to draw from this chapter. Time has moved on, so contemporary contexts are different. Nevertheless, it might be beneficial to note certain factors that



were important, including in the short term: support from the dominant church in England and Wales (Grimley 2009); a liberal left government with a talented risk-taking politician, Roy Jenkins, in charge of criminal justice (Jenkins 1959; 1991; Weeks 1981); brave ground-breaking activists like Antony Grey willing to found new organisations and campaign publicly (Grey 1992); and some luck in a 'moral panic' (Hall 1980) leading to a review with a liberal outcome. But in the longer view decriminalisation can be viewed as a consequence of the ascendance of liberal philosophies in law and social policy, political and cultural shifts in 'hegemony' associated with the 1960s, changes in religious attitudes to the relationship between sin and crime and other deep-rooted social changes discerned by historians and sociologists of sexuality (Waite 2005, pp. 96–118). As Foucault's work on governmentality suggests, it also somewhat reflected a confidence of authorities in the efficacy of medicalisation, moral regulation and other tactics of intervention in the private sphere (Foucault 2007). It has been argued here that decriminalisation embodied *both* a shift towards liberal political understandings of citizenship in specific respects *and* to new forms of governmentality; and it is likely that any decriminalisation globally will similarly involve at least some element of both of these tendencies. In considering the present situation in other states, it will therefore be important to estimate the potential for decriminalisation – and develop strategies to achieve it – in a manner attentive to a variety of social processes operating, and with critical analytical frameworks from social and political theory at hand.

## Bibliography

- Adonis, A. (2011) 'Roy Jenkins as a transformational minister: Mister Speaker's lectures on great 20th-century parliamentarians', 15 Oct., available at [www.instituteforgovernment.org.uk/sites/default/files/Roy\\_Jenkins\\_as\\_transformational\\_minister\\_FINAL.pdf](http://www.instituteforgovernment.org.uk/sites/default/files/Roy_Jenkins_as_transformational_minister_FINAL.pdf) (accessed 6 Dec. 2012).
- Barry, A., T. Osborne and N. Rose (1996) 'Introduction', in A. Barry, T. Osborne and N. Rose (eds.), *Foucault and Political Reason: Liberalism, neo-liberalism and rationalities of government* (London: UCL Press Ltd).
- Bech, H. (1997) *When Men Meet: Homosexuality and Modernity* (Cambridge: Polity Press).
- Bell, D. and J. Binnie (2000) *The Sexual Citizen: Queer Politics and Beyond* (Cambridge: Polity Press).
- Bennett, J. (2010) 'Keeping the Wolfenden from the door? Homosexuality and the 'Medical Model' in New Zealand', *Social History of Medicine* 23 (1), pp. 134–52.



- Berlant, L. and M. Warner (1998) 'Sex in public', *Critical Inquiry*, 24 (2), pp. 547–66.
- Bland, L., T. McCabe and F. Mort (1979). 'Sexuality and reproduction: three "official" instances', in M. Barrett, P. Corrigan, A. Kuhn and J. Wolff (eds.), *Ideology and Cultural Production* (New York: St. Martin's Press), pp. 78–111.
- Burchell, G., C. Gordon and P. Miller (eds.) (1991) *The Foucault Effect: Studies in Governmentality, with two lectures and an interview with Michel Foucault* (Chicago: University of Chicago Press).
- Campbell, J. (1983) *Roy Jenkins: A Biography* (London: Weidenfeld and Nicolson).
- Channel 4 (1997a) *A Bill Called William* [television documentary] 3 July.
- (1997b) *Secret History: Lords of the Underworld* [television documentary] 23 June.
- Committee on Homosexual Offences and Prostitution, Home Office and Scottish Home Department (1957) *Report of the Committee on Homosexual Offences and Prostitution*, Cmnd.247 (London: HMSO).
- Connell, R.W. (1995) *Masculinities* (Cambridge: Polity Press).
- Cook, M. (2007) 'Queer conflicts: love, sex and war, 1914–1967', in M. Cook (ed.), *A Gay History of Britain: Love and Sex Between Men Since the Middle Ages* (Oxford: Greenwood World Publishing), pp. 145–78.
- Council of Europe (2011) *Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and No. 14*, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> (accessed 6 Dec. 2012).
- David, H. (1997) *On Queer Street: A Social History of British Homosexuality 1895–1995* (London: HarperCollins).
- Davidson, R. and G. Davis (2004) "'A field for private members': the Wolfenden committee and Scottish homosexual law reform", *Twentieth Century British History* 15 (2), pp. 174–201.
- Davies, C. (1975) *Permissive Britain: Social Change in the Sixties and Seventies* (London: Pitman).
- (1980) 'Moralists, causalists, sex, law and morality', in W.H.G. Armytage, R. Chester and J. Peel (eds.), *Changing Patterns of Sexual Behaviour* (London: Academic Press), pp. 13–43.
- Day, S. (2008) 'Wolfenden 50: revisiting state policy and the politics of sex work in the U.K.', in V. E. Munro and M. Della Giusta (eds.), *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Aldershot: Ashgate), pp. 51–66.

- Dean, M. (1999). *Governmentality: Power and Rule in Modern Society* (London: Sage).
- Dempsey, B. (1998) 'Piecemeal to equality: Scottish gay law reform', in L.J. Moran, D. Monk and S. Beresford (eds.), *Legal Queeries: lesbian, gay and transgender legal studies* (London: Cassell), pp. 155–66.
- Devlin, P. (1959) *The Enforcement of Morals: Maccabean Lecture in Jurisprudence* (London: OUP).
- Doan, L. (2001) *Fashioning Sapphism: The Origins of a Modern English Lesbian Culture* (New York: Columbia University Press).
- Duggan, M. (2012) *Queering Conflict: Examining Lesbian and Gay Experiences of Homophobia in Northern Ireland* (Farnham: Ashgate).
- European Commission of Human Rights (1997) *Sutherland v. United Kingdom: Report of the Commission*, Application 25186/94, 1 July, available at [http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=bkm&action=html&highlight=Sutherland&sessionid=82445957&skin=](http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=bkm&action=html&highlight=Sutherland&sessionid=82445957&skin=hudoc-en) hudoc-en (accessed 24 Nov. 2011).
- Evans, D. (1993) *Sexual Citizenship: The Material Construction of Sexualities* (London: Routledge).
- Evening News* (1957) 'What they say about the Vice Report', 5 Sep.
- Faulks, S. (1996) 'Jeremy Wolfenden', in S. Faulks, *The Fatal Englishman: Three Short Lives* (London: Hutchinson), pp. 209–309.
- Foucault, M. (1978a) *Discipline and Punish* (New York: Pantheon Books).
- (1978b) 'Governmentality', in G. Burchell, C. Gordon and P. Miller (eds.), *The Foucault Effect: Studies in Governmentality* (Chicago: The University of Chicago Press).
- (1981) *The History of Sexuality, Volume One: An Introduction* (London: Penguin).
- (1982) 'Afterword: the subject and power', in H.L. Dreyfus and P. Rabinow (eds.), *Michel Foucault: Beyond Structuralism and Hermeneutics* (Brighton: Harvester Press Limited), pp. 208–16.
- (2007) *Security, Territory, Population: Lectures at the Collège de France* (London: Palgrave Macmillan).
- Gordon, C. (1991) 'Governmental rationality: an introduction', in G. Burchell, C. Gordon and P. Miller (eds.), *The Foucault Effect: Studies in Governmentality, with two lectures and an interview with Michel Foucault* (Chicago: University of Chicago Press), pp. 1–52.
- Gramsci, A. (1971) *Selections from the Prison Notebooks* (London: Lawrence & Wishart).

- Greenwood, V. and J. Young (1980) 'Ghettos of freedom: an examination of permissiveness', in National Deviancy Conference (ed.), *Permissiveness and Control: The Fate of the Sixties Legislation* (London: Macmillan), pp. 149–74.
- Grey, A. (1992) *Quest For Justice: Towards Homosexual Emancipation* (London: Sinclair-Stevenson).
- (1997a) *Speaking Out: Writings on Sex, Law, Politics and Society 1954–1995* (London: Cassell).
- (1997b) *Heterosexual Dictatorship* by Patrick Higgins, reviewed by Antony Grey, *Gay and Lesbian Humanist*, Spring 1997, available at [www.pinktriangle.org.uk/ghl/163/higgins.html](http://www.pinktriangle.org.uk/ghl/163/higgins.html) (accessed 6 Dec. 2012).
- Grimley, M. (2009) 'Law morality and secularisation: the Church of England and the Wolfenden report, 1954–1957', *The Journal of Ecclesiastical History* 60 (4), pp. 725–41.
- Guardian, The* (1958) 'Wolfenden Debate' – editorial, 26 Nov.
- (1997) 'Gay prisoners given shock treatment, papers reveal', *The Guardian*, 28 Nov., p. 1.
- Hall, S. (1980) 'Reformism and the legislation of consent', in National Deviancy Conference (ed.), *Permissiveness and Control: The Fate of the Sixties Legislation* (London: Macmillan), pp. 1–43.
- Hart, H.L.A. (1963) *Law, Liberty and Morality* (London: OUP).
- Hauser, R. (1962) *The Homosexual Society* (London: The Bodley Head).
- Higgins, P. (1996) *Heterosexual Dictatorship: Male Homosexuality in Post-War Britain* (London: Fourth Estate).
- Houlbrook, M. (2005) *Queer London: Perils and Pleasures in the Sexual Metropolis 1918–1957* (Chicago: University of Chicago Press).
- Independent on Sunday Magazine* (1997), 15 June.
- Jeffery-Poulter, S. (1991) *Peers, Queers and Commons: The Struggle for Gay Law Reform from 1950 to the Present* (London: Routledge).
- Jenkins, R. (1959) *The Labour Case* (London: Penguin).
- (1991) *A Life at the Centre* (London: Macmillan).
- Kinsey, A., W. Pomeroy and C. Martin (1948) *Sexual Behaviour in the Human Male* (London: W.B. Saunders Company).
- Laclau, E. and C. Mouffe (1985) *Hegemony and Socialist Strategy* (London: Verso).
- Law Commission (1995) *Consent in the Criminal Law*, consultation paper no. 139 (London: HMSO).
- Lukes, S. (2005) *Power: A Radical View*, 2nd edn. (Basingstoke: Palgrave Macmillan).

- Marshall, T.H. (1950) *Citizenship and Social Class, and Other Essays* (Cambridge: Cambridge University Press).
- McGhee, D. (2000) 'Wolfenden and the fear of "homosexual spread": permeable boundaries and legal defences', *Studies in Law, Politics and Society* 21, pp. 65–97.
- (2001) *Homosexuality, Law and Resistance* (London: Routledge).
- Meek, J. (2011) *Gay and bisexual men, self-perception and identity in Scotland 1940–1980*, PhD thesis, University of Glasgow.
- Mill, J.S. (1962) *Utilitarianism, On Liberty, Essay on Bentham* (London: Collins).
- (1974) *On Liberty*, ed. G.Himmelfarb (Harmondsworth: Penguin).
- Miller, P. and N Rose (1988) 'The government of subjectivity and social life', *Sociology* 22 (2), pp. 171–92.
- (2008) *Governing the Present* (Cambridge: Polity Press).
- Moran, L.J. (1995) 'The homosexualization of English law', in D. Herman and C. Stychin (eds.), *Legal Inversions: Lesbians, Gay Men and the Politics of Law* (Philadelphia: Temple University Press), pp. 3–28.
- (1996) *The Homosexual(ity) of Law* (London: Routledge).
- (1997) 'Enacting intimacy', *Studies in Law, Politics and Society* 16, pp. 255–74.
- Mort, F. (1980) 'Sexuality: regulation and contestation', in Gay Left Collective (ed.), *Homosexuality, Power and Politics* (London: Allison and Busby), pp. 38–51.
- (1999) 'Mapping sexual London: The Wolfenden Committee on Homosexual Offences and Prostitution 1954–1957', *New Formations* 37, pp. 92–113.
- Mouffe, C. (1993). *The Return of the Political* (London: Verso).
- Newburn, T. (1992) *Permission and Regulation: Law and Morals in Post-War Britain* (London: Routledge).
- Oram, A. and A. Turnbull (2001) *The Lesbian History Sourcebook* (London: Routledge).
- Osgerby, B. (1998) *Youth in Britain since 1945* (London: Blackwell).
- Pink Paper* (1997) 'They linked East End to the Establishment', *Pink Paper*, 20 June 1997, p. 2.
- Policy Advisory Committee on Sexual Offences (1979) *Working Party on the Age of Consent in Relation to Sexual Offences*, June (London: HMSO).
- (1981) *Report on the Age of Consent in Relation to Sexual Offences*, April, Cmnd. 8216 (London: HMSO).

- Reekie, A. (1997) 'European international control', in D.J. West and R. Green (eds.), *Sociolegal Control of Homosexuality: A Multi-Nation Comparison* (London: Plenum Press), pp. 179–95.
- Rose, N. (1999) *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press).
- Sedgwick, E.K. (1990) *Epistemology of the Closet* (Berkeley: University of California Press).
- Smart, B. (2002) *Michel Foucault*, 2nd edn. (London: Routledge).
- Squires, J. (1999) *Gender in Political Theory* (Cambridge: Polity Press).
- Sunday Times* (1954) 'Law and hypocrisy' – editorial, 28 Mar.
- United Nations (1948) *Universal Declaration of Human Rights*, available at [www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng](http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng) (accessed 6 Dec. 2012).
- Waites, M. (2005a) *The Age of Consent: Young People, Sexuality and Citizenship* (Basingstoke: Palgrave Macmillan).
- (2005b) 'The fixity of sexual identities in the public sphere: biomedical knowledge, liberalism and the heterosexual/homosexual binary in late modernity', *Sexualities* 8 (5), pp. 539–69.
- (2009) 'Lesbian, gay and bisexual NGOs in Britain: past, present and future', in N.J. Crowson, M. Hilton and J. McKay (eds.), *NGOs in Contemporary Britain: Non-State Actors in Society and Politics since 1945* (Basingstoke: Palgrave Macmillan), pp. 95–112.
- (2010) 'Sexual orientation, human rights and the generation of childhoods: analyzing the partial decriminalisation of "unnatural offences" in India', in P. Hynes, M. Lamb, D. Short and M. Waites (eds.), special issue 'Sociology and Human Rights', *International Journal of Human Rights* 14 (6), pp. 971–93.
- Weeks, J. (1977) *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present* (London: Quartet Books).
- (1981) *Sex, Politics and Society: The Regulation of Sexuality since 1800* (London: Longman).
- (1989) *Sex, Politics and Society: The Regulation of Sexuality since 1800*, 2nd edn. (London: Longman).
- (1990) *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present*, 2nd edn. (London: Quartet Books).
- (2004) 'Wolfenden, John Frederick, Baron Wolfenden (1906–1985)', *Oxford Dictionary of National Biography* (Oxford: Oxford University Press).

- (2007a) 'Wolfenden and beyond: the remaking of homosexual history', *History and Policy*, available at [www.historyandpolicy.org/papers/policy-paper-51.html](http://www.historyandpolicy.org/papers/policy-paper-51.html) (accessed 6 Dec. 2012).
- (2007b) *The World We Have Won* (London: Routledge).
- Wolfenden, J.F. (1976) *Turning Points: the Memoirs of Lord Wolfenden* (London: Bodley Head).